Supreme Court, U.S.
FILED

(1) 81556 MAR 8 - 1999

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No. _____

In the
Supreme Court of the United States
October Term, 1998

MICHAEL L. PIASKOWSKI,
Petitioner,

v.

STATE OF WISCONSIN,
Respondent.

Petition for Writ of Certiorari to the Court of Appeals of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a defendant's right to due process violated when an appellate court sustains a conviction on the basis of evidence that the trial judge considered to be too incredible to support the conviction?

2. Is the constitutional right to confront witnesses violated when the unreliable hearsay statement of a co-defendant is admitted against a defendant on the theory that the statement was against the declarant's social interest, and if so, is the error cured if the declarant takes the stand on his own behalf after the prosecution rests?

3. Is the right to due process violated when the court refuses to grant a new trial on the basis of a recantation by the only witness who linked the defendant to the crime?

4. Did the denial of a severance violate the petitioner's right to due process?

5. Was the petitioner's right to confront witnesses violated when he was precluded from cross-examining a prosecution witness to elicit the witness' attempt to negotiate with the district attorney's office for favorable treatment?

6. Did the State violate the petitioner's right to obtain exculpatory evidence when it failed to disclose that a key witness told the prosecution prior to trial that he did not believe his statement to the police was truthful?

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Petition for Writ of Certiorari to the Court of Appeals of Wisconsin

PETITION FOR WRIT OF CERTIORARI

Petitioner Michael L. Piaskowski respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Wisconsin entered in this proceeding on September 22, 1998.

OPINIONS BELOW

The opinion of the Court of Appeals of Wisconsin has not been published. It is reproduced in the attached appendix. The Supreme Court of Wisconsin entered an unpublished order denying the petitioner's petition for review.

JURISDICTION

The judgment of Court of Appeals of Wisconsin was entered on September 22, 1998. The Supreme Court of Wisconsin entered an order on December 8, 1998 denying the petitioner's petition to accept review of the decision of the court of appeals. This Court's jurisdiction to consider this petition from the final judgment by the highest court of the state in which the decision could be had is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

(a) Fifth Amendment, United States Constitution:

> No person ... shall be ... deprived of life, liberty, or property, without due process of law ....

(b) Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ....

STATEMENT OF THE CASE

The Green Bay Police Department received an anonymous telephone call on November 10, 1992 reporting an employee theft that was expected to occur at the James River paper mill. The caller said that Keith Kutska would be

taking a piece of extension cord from the plant. The caller asked the police to inform plant security.

The police relayed the caller's tip to James River plant security. James River security guards tried to stop Kutska as he left the plant on November 10, 1992. The guards asked Kutska to open the bag he was carrying. Kutska said there was nothing in the bag but laundry and left the plant.

Kutska later learned that the security guards had tried to stop him because of the anonymous call to the police. He obtained a copy of the taped call from the police department on November 20, 1992. Kutska listened to the tape and recognized Thomas Monfils' voice.

Kutska contacted Marlyn Charles, the union president. Kutska wanted to file "union charges" against Monfils. Charles said charges couldn't be filed against Monfils because Monfils didn't leave his name on the tape. Kutska suggested that Monfils might admit that he made the call. Charles told him that the admission would need to be witnessed by two people before charges could be filed.

Kutska played the tape for Michael Piaskowski and Randy LePak. They both recognized Monfils' voice. Kutska asked them to act as witnesses because he knew they would be working on the following day, Saturday.

On Saturday, November 21, 1992, prior to 7:00 a.m., Kutska played the tape for a large number of people at James River. Marlyn Charles made a copy of the tape in coop[1] 8 prior to 6:30 a.m. A number of people who worked in the area of coops 5 and 8 listened to the tape at that time.

At some point, LePak went to the coop 9 to meet Kutska. Other employees were also there. While LePak was in coop 9, Dale Basten and Mike Johnson arrived to repair a problem with the number 9 paper machine. Kutska played the tape for the occupants of the coop.

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[1] Control rooms for paper machines are commonly referred to as "coops."

Donald Boulanger signaled that Monfils and Piaskowski had entered coop 7, where they were working. LePak and Kutska entered coop 7. Kutska played the tape for Monfils and asked him to admit that his voice was on the tape. Monfils eventually admitted that the voice was his. Kutska asked him why he did it. Monfils said he had acted as a concerned employee. Kutska told Monfils that his actions had been malicious. Kutska then left. Piaskowski told Monfils that he couldn't believe Monfils had done that. Piaskowski then left the coop. LePak told Monfils that he had jeopardized Kutska's job, and that it was a chicken shit thing to do. LePak then left the coop.

Kutska returned to coop 9, where he continued to play the tape for people who entered the coop. Piaskowski eventually entered coop 9 and heard Kutska playing the tape for various occupants of the coop. At that time, Piaskowski heard Kutska tell Moore to go "give Monfils some shit."

Brian Kellner testified that Kutska told him about a confrontation between Monfils and the six defendants that took place near a bubbler. Kellner's testimony about that confrontation is discussed below.

Soon after the alleged confrontation by the bubbler, Piaskowski asked Pete Delvoe if he had seen Monfils. Piaskowski called a supervisor to report Monfils missing because he wanted to get Monfils in trouble.

After drinking at a wedding reception about six months after Monfils' murder, David Wiener suddenly remembered that he had seen defendants Basten and Johnson apparently carrying something through the plant. The State argued that they were carrying Monfils. The State's handwriting expert testified that Wiener wrote a suicide note that purported to have been written by Monfils. However, Wiener was not charged with Monfils' murder.

Monfils' body was eventually found in a pulp vat. A weight had been tied around the neck. Medical testimony established that Monfils died from asphyxiation by inhaling

the pulp that was in the vat and/or by strangulation from the rope around his neck. He had been beaten before he died.

Six defendants, including Piaskowski, were jointly tried for murder as a result of Monfils' death. All six were convicted. Piaskowski appealed to the Court of Appeals of Wisconsin. The court of appeals affirmed his conviction. Piaskowski filed a petition for review with the Supreme Court of Wisconsin, seeking discretionary review of the Court of Appeals' decision. The Supreme Court did not grant review.

The federal questions presented on appeal were raised in the court of appeals by the petitioner's initial brief. The sufficiency of evidence question (issue I below) was raised in the trial court by a post-conviction motion seeking a judgment of acquittal. The confrontation question (issue II below) was raised in the trial court prior to trial by pretrial motion and after trial by a post-conviction motion. Both issues are addressed by the trial court's order denying post-conviction motions.

REASONS FOR GRANTING THE WRIT

I. A DEFENDANT'S RIGHT TO DUE PROCESS IS VIOLATED WHEN AN APPELLATE COURT SUSTAINS A CONVICTION ON THE BASIS OF EVIDENCE THAT THE TRIAL JUDGE CONSIDERED TO BE TOO INCREDIBLE TO SUPPORT THE CONVICTION

Criminal defendants have a constitutional right to reversal of convictions that are not supported by proof beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318 (1979). That constitutional standard is diminished,

if not lost, when an appellate court disregards a trial judge's conclusion that the only evidence against the defendant was so incredible that it could not support a guilty verdict. The Wisconsin court of appeals held that it lacked the power to overturn a conviction even if it believed that the trier of fact should not have found guilt based on the evidence before it. *State v. Piaskowski,* No. 97-2104-CR, slip op. at 3 (Wis. Ct. App. Sept. 22, 1998) In the ordinary case, that standard of review provides a dubious safeguard of the right to be free from conviction when the evidence fails to establish guilt beyond a reasonable doubt. This, however, is not an ordinary case. The trial judge concluded that the only evidence offered against Piaskowski was so lacking in probative value that it would not support a conviction. The court of appeals nonetheless relied on that very evidence in affirming Piaskowski's conviction. The standard of review adopted by the court of appeals — a standard that affirms convictions on the basis of evidence that the trial judge found to be patently incredible — is inconsistent with the constitutional standard of appellate review required by *Jackson*.

The court of appeals found the evidence sufficient to establish that Piaskowski conspired with his five co-defendants to do away with Monfils. The State didn't argue to the jury that Piaskowski engaged in a conspiracy. Rather, the State argued that Piaskowski aided and abetted the murder. Because there wasn't a shred of evidence to support that theory, the State abandoned the "aid-and-abet" theory on appeal. The court of appeals adopted the conspiracy theory, citing a 1934 case for the proposition that a murder conspiracy continues during the time that the conspirators take action to prevent the discovery of the crime to conceal the identities of the perpetrators. (Slip op. at 6) The court of appeals cited no evidence, however, that Piaskowski agreed to take any action whatsoever to hide the crime. In fact, as the court of appeals noted, Piaskowski called attention to the fact that Monfils was missing.

To conclude that the evidence supported Piaskowski's participation in a conspiracy to murder Monfils, the court of appeals relied on the following evidence.

> Although there is no evidence that Piaskowski directly killed Monfils by throwing him into the vat, the jury could reasonably infer that Piaskowski was part of the conspiracy to beat Monfils and cover up his death. The evidence establishes that Piaskowski was present at the confrontation and told the foreman that Monfils was missing and that "some heavy shit" was "coming down." There was also evidence that Piaskowski and the other defendants kicked and beat Monfils. From this evidence, it was reasonable for the jury to infer that Piaskowski played a larger role than that of mere observer, that he took overt action to beat Monfils and cover up the murder when he reported Monfils as missing. The jury could reasonably infer that Piaskowski knew that Monfils was missing because he knew Monfils had been dumped into a vat.

Piaskowski, slip op. at 6. No witness ever claimed to have seen Piaskowski kick or beat Monfils. One inmate witness testified that one of Piaskowski's co-defendants told him that some individuals were striking Monfils, but that witness didn't identify Piaskowski as a person who did so. That witness, in fact, didn't identify Piaskowski as a person who was present during the beating. Thus, the only evidence upon which the court of appeals could have relied in the brief analysis cited above was the testimony of Brian Kellner, who claimed that Keith Kutska (one of the co-defendants) told him during a drunken discourse in a bar that a confrontation with Monfils had taken place and that Piaskowski had been present at the confrontation. Kellner did *not* testify, however,

that Kutska identified Piaskowski as someone who either struck Monfils or encouraged anyone else to do so. In fact, Kutska supposedly told Kellner that he left the scene before the confrontation with Monfils escalated into violence.

The court of appeals apparently bootstrapped the hearsay testimony of the inmate who claimed to have heard that some participants in a confrontation beat Monfils (but didn't identify Piaskowski as being present) to the hearsay testimony of Kellner, who said Kutska told him that Piaskowski was present at a confrontation with Monfils. The court of appeals' implicit conclusion that the two pieces of hearsay added up to proof beyond a reasonable doubt overlooked the trial court's assessment of Brian Kellner. The trial court expressly ruled that Kellner's testimony (which Kellner later recanted), recounting Kutska's drunken ramblings, was not credible.[2] The trial court ruled that defense counsel correctly argued that a conviction could not be based on Kellner's evidence, and opined that if Kellner's testimony were the only evidence in the case, "the Court would never have allowed this case to go to the jury." The trial court mistakenly upheld Piaskowski's conviction on the theory that the jury may not have believed Piaskowski's exculpatory testimony and that it was allowed to infer from its disbelief of Piaskowski's testimony that he committed the crime — a theory that everyone concedes is contrary to Wisconsin law, *see Stewart v. State,* 83 Wis.2d 185, 193, 265 N.W.2d 489 (1978) — and that the court of appeals did not rely upon in sustaining the conviction.

The court of appeals thus upheld Piaskowski's conviction on the basis of testimony that the trial judge viewed as too incredible to support a conviction. The court

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[2] The trial judge described Kellner's testimony in these terms: "He recounted an instance which occurred after an all-day drinking bout. Mr. Kutska was intoxicated when the events occurred. Mr. Kellner was close behind him in his level of intoxication."

of appeals did so because it felt bound to accept any evidence of guilt upon which the jury might have relied — even evidence that the trial judge ruled out as a possible basis for conviction. Had the trial judge not been mistaken about his alternate theory for sustaining the conviction, he would have thrown out the conviction as unsupported by proof beyond a reasonable doubt. When a trial judge views the only evidence of guilt as insufficient to support a conviction, sustaining a conviction on the basis of that evidence frustrates *Jackson* and deprives a defendant of his right to have his conviction reversed if the evidence against him does not prove guilt beyond a reasonable doubt.

The Supreme Court should grant review to decide whether the rule announced in *Jackson* is violated by a state appellate court that rejects a trial judge's decision that evidence in support of guilt is too incredible to justify a conviction. Wisconsin's deviation from the constitutional standard threatens the integrity of convictions statewide, and — if the Supreme Court does not decide the issue — is likely to result in appellate courts in Wisconsin and elsewhere sustaining convictions despite the trial judge's belief that the evidence supporting a conviction did not prove guilt beyond a reasonable doubt. The unique issue presented by this case — whether an appellate court reviewing a sufficiency of evidence claim is free to disregard the trial judge's conclusion that the evidence relied upon by the appellate court was too incredible to prove guilt beyond a reasonable doubt — is an important issue of constitutional law. Appellate courts in Wisconsin and elsewhere need guidance in shaping standards of review that are mindful of the "beyond a reasonable doubt" standard.

II. THE CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES IS VIOLATED WHEN THE UNRELIABLE HEARSAY STATEMENT OF A CO-DEFENDANT IS ADMITTED AGAINST A DEFENDANT, AND IS NOT CURED WHEN THE CO-DEFENDANT LATER TESTIFIES ON HIS OWN BEHALF

The case against Piaskowski was built around the hearsay testimony of Brian Kellner, who claimed that Keith Kutska, a co-defendant, told him that he and the other co-defendants confronted Monfils to let him know they were displeased that Monfils had reported Kutska's apparent theft of a cord to the police. According to Kellner, Kutska said that the co-defendants hollered at Monfils, one of them (not identified by Kutska) slapped the back of Monfils' head, and another (not Piaskowski) shoved Monfils' in the chest. Kutska asked "what if" Monfils had been hit with a wrench or a board, but didn't say that actually happened. Kutska told Kellner that he left at that point, and didn't see what happened after he left.

Over objection, Kellner's hearsay statement was admitted against the other co-defendants. The trial court concluded, and the court of appeals agreed, that the statement was admissible as a statement against Kellner's penal and social interest. The court concluded that the admission didn't violate the confrontation clause because these were firmly rooted hearsay exceptions, and because Kellner later testified in his defense.

Kellner's testimony violated the confrontation clause. The Sixth Amendment guarantees the right to confront witnesses. *Chambers v. Mississippi,* 410 U.S. 284, 294 (1973). The right to confront includes the right to cross-examine. *Kentucky v. Stincer,* 482 U.S. 730, 737 (1987). Confrontation permits the jury to assess the credibility of the person making the statement and forces the witness to submit

to cross-examination, "the greatest legal engine ever invented for the discovery of the truth." *California v. Green,* 399 U.S. 149, 158 (1970).

The confrontation clause restricts the admissibility of hearsay. Generally, the prosecution must prove that the declarant is unavailable to testify at trial. The prosecution must next demonstrate that the hearsay is so reliable that confronting the witness would essentially be a fruitless endeavor. *Idaho v. Wright,* 497 U.S. 805, 822-23 (1990); *Ohio v. Roberts,* 488 U.S. 56, 65 (1980).

Kellner's statement wasn't reliable. As the trial judge noted, Kellner recounted a statement related to him during the course of an all-day drinking bout. Kutska didn't say anything against his own interest when he claimed that Piaskowski was present during a confrontation with Monfils. Rather, Kutska's statement was exculpatory — he claimed to have left when pushing started. He denied striking Monfils himself and denied being present during any act of serious violence against Monfils.

It is a "time-honored reaching that a co-defendant's confession inculpating the accused is inherently unreliable, and that convictions supported by such evidence violate the constitutional right of confrontation." *Lee v. Illinois,* 476 U.S. 530, 546 (1986). Kutska's statement that Piaskowski was present during the confrontation with Monfils inculpated Piaskowski (at least in the view of the prosecution, which argued that Piaskowski was part of the crowd and thus must have had something to do with Monfils' death). That statement was not remotely against Kutska's interest, and thus was not reliable.

Wisconsin and federal law both stand for the proposition that the portion of a co-defendant's statement that inculpates another co-defendant is not an admission against interest. *Williamson v. United States,* 512 U.S. 594, 599-600 (1994); *State v. Pepin,* 110 Wis.2d 431, 438, 328 N.W.2d 898 (Ct. App. 1982). Certainly, Kutska said nothing against

his own interest when he said that Piaskowski was present at a confrontation with Monfils, and that Kutska left Piaskowski (and the other co-defendants) there before anything happened to Monfils. Kutska's admission that he was present at the confrontation might have been against his interest, but not his contention that Piaskowski was also present.

In a cursory analysis, the court of appeals concluded that "Kutska may have subjectively believed he was exculpating himself by stating he was not actively involved in the confrontation," but that his admission was nonetheless against his interest because a reasonable person would not "assert his involvement in a verbal and physical confrontation with a man who was murdered minutes later." *Piaskowski,* slip op. at 18. That analysis begs the question; whether or not Kutska inculpated himself, his claim that Piaskowski was present was not a statement against his own interest, and thus did not provide an exception to the confrontation requirement. Moreover, if Kutska "subjectively believed he was exculpating himself," his statement cannot be viewed as so reliable that it provides a basis for convicting Piaskowski of murder.

The court of appeals also viewed the statement as admissible because it was against Kutska's societal interest. Yet only "firmly rooted" exceptions to the hearsay rule will overcome the constitutional right to confront a witness. *White v. Illinois,* 502 U.S. 346, 356 (1992). The "against societal interest" exception is far from "firmly rooted." Only ten states have adopted the exception. *State v. Stevens,* 171 Wis.2d 106, 112, 490 N.W.2d 753 (1992). The Federal Rules of Evidence does not incorporate the "social interest" exception. *Id.* at 112-13. In fact, Congress specifically rejected the exception. The House Report noted that the social interest exception lacked sufficient guarantees of reliability. *See* Report at 16-17, *quoted in* 2 Moore's Federal Rules Pamphlet ¶ 804.12[2] at 432 (1998). A hearsay exception that exists in only ten states, that didn't exist at

common law, and that has been rejected by Congress can hardly be said to be "firmly rooted." Since some states are adopting the exception, however, the time is ripe for the Supreme Court to decide whether evidence admitted pursuant to that exception justifies dispensing with the right of confrontation.

The final question is whether Piaskowski's confrontation rights were restored when Kutska took the stand in his own defense, affording Piaskowski a chance to cross-examine him. If Kutska's statement had been barred by the confrontation clause during the State's case-in-chief, as it should have been, a directed verdict for Piaskowski would have been entered after the State rested, because there was no other evidence linking Piaskowski to the crime. Thus, the fact that Kutska was forced by the admission of his statement into evidence to take the stand and refute the statement cannot render the error harmless.

The Supreme Court has never decided whether a denial of the right to confront a witness is rendered harmless if the witness testifies after the State rests. Given the circumstances of this case — in which the evidence that should never have been admitted formed the only basis for Piaskowski's conviction — finding the error harmless would destroy the prophylactic value of the confrontation clause. The Supreme Court should grant *certiorari* to clarify how states are to apply the confrontation clause in situations where a witness will not take the stand during the State's case-in-chief but may testify later.

III. DUE PROCESS IS VIOLATED WHEN THE COURT REFUSES TO GRANT A NEW TRIAL ON THE BASIS OF A RECANTATION BY THE ONLY WITNESS WHO LINKED THE DEFENDANT TO THE CRIME

Although this is an important issue, it is not an issue that is likely to meet the Court's criteria for a grant of certiorari. The petitioner raises the issue to preserve it for further review.

IV. THE DENIAL OF A SEVERANCE VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS

Although this is an important issue, it is not an issue that is likely to meet the Court's criteria for a grant of certiorari. The petitioner raises the issue to preserve it for further review.

V. THE PETITIONER'S RIGHT TO CONFRONT WITNESSES WAS VIOLATED WHEN HE WAS PRECLUDED FROM CROSS-EXAMINING A STATE'S WITNESS TO ELICIT THE WITNESS' ATTEMPT TO NEGOTIATE WITH THE DISTRICT ATTORNEY'S OFFICE FOR FAVORABLE TREATMENT

Although this is an important issue, it is not an issue that is likely to meet the Court's criteria for a grant of certiorari. The petitioner raises the issue to preserve it for further review.

VI. THE STATE VIOLATED THE PETITIONER'S RIGHT TO OBTAIN EXCULPATORY EVIDENCE WHEN IT FAILED TO DISCLOSE THAT A KEY WITNESS TOLD THE PROSECUTION PRIOR TO TRIAL THAT HE DID NOT BELIEVE A STATEMENT HE MADE TO THE POLICE WAS TRUTHFUL

Although this is an important issue, it is not an issue that is likely to meet the Court's criteria for a grant of certiorari. The petitioner raises the issue to preserve it for further review.

CONCLUSION

For all the reasons stated, petitioner, Michael L. Piaskowski, requests that this Court grant a Writ of Certiorari to review the decision of the Court of Appeals of Wisconsin.

Respectfully submitted,

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[Filed September 22, 1998]

IN COURT OF APPEALS
FOR STATE OF WISCONSIN
DISTRICT III

Case No. 97-2104-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL L. PIASKOWSKI,

Defendant-Appellant.

DECISION

[1] APPEAL from a judgment and order of the circuit court for Brown County: JAMES T. BAYORGEON, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

CANE, C.J. Michael L. Piaskowski appeals the judgment of conviction and postconviction order as a result of the November 1992 murder of Thomas Monfils. Following a joint trial, a jury convicted Piaskowski and five [2] other defendants[1] of first-degree intentional homicide,

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[1] Defendants Dale Basten, Michael Johnson, and Reynold Moore's appeals were consolidated and affirmed in February 1998. ***State v. Basten***, Nos. 97-0918-CR, 97-0919-CR 97-1193-CR, unpublished slip op. (Wis. Ct. App. Feb. 17, 1998). We affirmed Michael Hirn's

party to a crime, contrary to §§ 940.01(1) and 939.05, STATS. On appeal, Piaskowski argues that: (1) insufficiency of the evidence entitles him to a new trial; (2) newly discovered evidence entitles him to a new trial; (3) the trial court erred by admitting a codefendant's hearsay statement; (4) denial of his severance motion violated his right to a fair trial; (5) denial of cross-examination of a State witness violated his confrontation rights; and (6) the State failed to disclose exculpatory evidence. We reject these arguments. In addition, Piaskowski requests that we review a State investigator's sealed personnel records to determine whether they impeach the investigator's credibility. We have reviewed the personnel records and agree with the trial court that they contain no relevant evidence. Accordingly, we affirm the judgment and postconviction order.

1. Sufficiency of the Evidence

Piaskowski argues that he is entitled to a new trial because the evidence is insufficient to support his conviction. To support this argument, Piaskowski cites ***Frankovis v. State***, 94 Wis.2d 141, 148, 287 N.W.2d 791, 794 (1980), for the proposition that the test of sufficiency is whether the evidence is "strong enough to exclude to a moral certainty every reasonable hypothesis of innocence." Piaskowski predicates his entire argument on this standard. In ***State v. Poellinger***, 153 Wis.2d 493, 506-07, 451 N.W.2d 752, 757-58 (1990), however, [3] our supreme court rejected the ***Frankovis*** standard.[2] Contrary to Piaskowski's assertion,

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conviction in June 1998. ***State v. Hirn***, No. 97-3518-CR, unpublished slip op. (Wis. Ct. App. June 30, 1998).

[2] ***Poellinger*** provides that "[t]o the extent that prior decisions of this court have suggested that these hypothesis of innocence rule is in any way applicable in reviewing the sufficiency of the evidence to support a conviction, we disapprove of those decisions and take the opportunity presented in this case to clearly state that it is not." ***State v. Poellinger***,

Poellinger governs our review, which is the same whether the evidence is direct or circumstantial. ***Id.***

We may not reverse a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilty beyond a reasonable doubt." ***Id.*** at 507, 451 N.W.2d at 757-58. "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, [we] may not overturn a verdict even if [we] believe that the trier of fact should not have found guilt based on the evidence before it." ***Id.*** at 507, 451 N.W.2d at 757. We need only decide if the "theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered." ***Id.*** at 508, 451 N.W.2d at 758.

The State presented evidence that on November 10, 1992, the police received an anonymous call reporting that Keith Kutska, an employee of the James River Corporation, intended to steal an expensive electrical cord from his employer. After Kutska finished his shift, he tried to leave the premises, but a security guard asked to inspect his bag. Because Kutska refused to open the bag, [4] he received a five-day unpaid suspension. Kutska later obtained a tape of the call from police. On November 20, Kutska approached Piaskowski near the No. 7 coop[3] and told him about his suspension and tape of the telephone call. About 5:30 p.m., after Kutska's shift was over, he called Piaskowski at work

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153 Wis.2d 493, 506, 451 N.W.2d 752, 757 (1990) (footnote omitted). In short, the supreme court specifically disapproved of ***Frankovis v. State***, 94 Wis.2d 141, 287 N.W.2d 791 (1980). ***Poellinger***, 153 Wis.2d at 506 & n.6, 451 N.W.2d at 757, & n.6.

[3] Located across from each paper machine is a control room or "coop."

and played the entire tape for him, and Piaskowski recognized the voice as Monfils'. Kutska implied that he had talked to the union and explained to Piaskowski that because Monfils did not identify himself on the tape, he needed two or three witnesses to identify Monfils before he could file union charges against him. Piaskowski was scheduled to work the next day, and he agreed to be a witness for Kutska when he played the tape for Monfils.

On November 21 at approximately 7 a.m., Kutska and Randy LePak entered the No. 7 coop; Piaskowski and Monfils were already in the coop. Kutska turned on a tape recorder, played the tape, and asked Piaskowski to "{name this tune." Monfils admitted he had indeed made the call. Kutska left the coop, and Piaskowski and LePak remained. On his way out of the coop, Piaskowski said, "Geez, Tom, I just fuckin' don't believe you'd do that." Piaskowski admitted that he was upset and disgusted that Monfils had made the call to police. Kutska then went to the No. 9 coop and played the tape again for those who entered the coop. Later, at approximately 7:30 a.m., Monfils performed a turnover (a change in the paper roll) on his paper machine. At approximately 8 a.m., Monfils was reported missing. The State presented evidence that between 7:30 and 8 a.m., a group of employees, including Piaskowski and the five other defendants, confronted Monfils. A verbal confrontation became physical, and Monfils was beaten. A blow to the back of the head rendered Monfils unconscious. The following day, [5] Monfils' partially decomposed body was found in a pulp vat. A heavy weight was found tied around Monfils' neck.

Brian Kellner, a friend of Kutska's, testified that on July 4, 1994, while at the Fox Den Bar, Kutska described the November 21 confrontation with Monfils, himself, Basten, Moore, Johnson, Piaskowski and Hirn. Kutska told Kellner

that he stood back and watched as the others shouted at Monfils and shook the tape in his face. Kutska described the events in terms of "what if" somebody had hit Monfils in the head with a wrench or a board.

James River employee David Wiener testified that on November 21 at approximately 7:40 a.m., he saw codefendant Dale Basten and Michael Johnson walking toward a vat connecting the No. 7 and No. 9 paper machines. They were walking hunched over, approximately six feet apart, and appeared to be carrying something. At approximately 7:45 a.m., Moore and Kutska entered the No. 7 coop. Shortly thereafter, Piaskowski entered the coop, and Kutska told Piaskowski to notify the foreman that Monfils was missing. According to Piaskowski, he informed the foreman that "some heavy shit" was "coming down" and recommended that the foreman "talk to Keith [Kutska] to find out what happened." Piaskowski testified that he called the foreman to "get Tom in trouble with the company."

A conspiracy requires a meeting of minds to accomplish a common purpose. ***O'Neil v. State***, 237 Wis. 391, 404-05, 296 N.W. 96 (1941). The two elements of a conspiracy are an agreement among two or more persons to accomplish a criminal objective and individual intent to accomplish that objective. ***State v. Hecht***, 116 Wis.2d 605, 625, 342 N.W.2d 721, 732 (1984). Circumstantial evidence is sufficient to establish that an agreement exists. ***Id.*** No [6] express agreement is required; rather, a "mere tacit understanding of a shared goal is sufficient." ***Id.*** Further, while intent may be inferred from conduct, mere presence and ambivalent conduct at a crime scene are insufficient to support a conviction. ***Id.*** at 627, 342 N.W. at 733.[4]

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[4] Piaskowski also argues that each member of the conspiracy must have an individual stake in the venture. An individual stake is not a third element of conspiracy; a lack of stake in the venture does not absolve a

Although there is no evidence that Piaskowski directly killed Monfils by throwing him into the vat, the jury could reasonably infer that Piaskowski was part of the conspiracy to beat Monfils and cover up his death. The evidence establishes that Piaskowski was present at the confrontation and told the foreman that Monfils was missing and that "some heavy shit" was "coming down." There was also evidence that Piaskowski and the other defendants kicked and beat Monfils. From this evidence, it was reasonable for the jury to infer that Piaskowski played a larger role than that of a mere observer, that he took overt action to beat Monfils and cover up the murder when he reported Monfils as missing. The jury could reasonably infer that Piaskowski knew that Mofils was missing because he knew Monfils had been dumped into a vat.

A conspiracy continues "while the conspirators continue to be active in taking measures to prevent the discovery of the crime or the identity of those connected with its perpetration." ***Gelosi v. State***, 215 Wis. 649, 656, 255 N.W. 893, 896 (1934) (quoted source omitted). Further, when murder is committed under circumstances in which the victim's body must be disposed of to avoid detection, the conspiracy continues while the conspirators dispose of the body. *See* ***id.*** Piaskowski's role reasonably reflects a tacit agreement and intent to beat [7] Monfils and cover up the murder by disposing of Monfils' body. Sufficient evidence supports the jury's verdict, and inferences from that evidence are not unreasonable as a matter of law.[5] We therefore must

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party to a crime of liability. ***State v. Hecht***, 116 Wis.2d 605, 627, 342 N.W.2d 721, 733 (1984).

[5] Because we conclude that sufficient evidence supports a conspiracy, we do not address whether the evidence is sufficient under ***Poellinger*** to prove that Piaskowski aided and abetted the murder.

reject Piaskowski's request for a new trial based on insufficiency of the evidence.

2. Newly Discovered Evidence

Piaskowski next asserts that the following newly discovered evidence entitles him to a new trial: (1) Brian Kellner recanted his trial testimony; and (2) David Wiener "virtually admitted" his involvement in Monfils' death. He insists the trial court applied the wrong legal standard when it assessed credibility rather than deciding if the new evidence would create a reasonable doubt at a new trial. We disagree.

At trial, Kellner testified that Kutska had told him that Hirn, Moore, Basten, Johnson, Piaskowski, Kutska and another individual were present at the confrontation with Monfils outside the No. 7 coop. In contrast, at the postconviction motions, he recanted this testimony and testified that Kutska's identification to him was not of those present at the confrontation, but of those individuals present in the No. 9 coop when the tape was being played. Contrary to his trial testimony, Kellner testified post-trial that the entire conversation occurred in the context of "what if."

Kellner testified that he felt the police had badgered him and that he had not agreed with everything Sergeant Randy Winkler, the investigating officer, [8] had put in his statement. At the post-trial hearing, however, Kellner testified that he gave untruthful answers at trial because the police threatened him with the loss of his children and job. Additionally, Kellner testified that he had experienced difficulties at his job since the trial because he had testified against fellow union members. He further testified post-trial that Kutska and Piaskowski were very close friends of his, and he felt he had been forced to testify against them.

Two Wisconsin cases provide the proper standard for reviewing a defendant's motion for a new trial based on a witness's recantation. *See* ***State v. Terrance J.W.***, 202 Wis.2d 496, 500, 550 N.W.2d 445, 447 (Ct. App. 1996); ***State v. McCallum***, 208 Wis.2d 463, 473, 561 N.W.2d 707, 710-11 (1997). A motion for a new trial based on a witness' recantation is entertained with great caution, and we submit the motion to the trial court's sound discretion. ***Terrance J.W.***, 202 Wis.2d at 496, 500, 550 N.W.2d at 447. We will affirm the trial court's exercise of discretion if it has a reasonable basis and was made in accordance with accepted legal standards and the facts of the record. ***Id.***

To obtain a new trial based on newly discovered evidence, the moving party must establish, by clear and convincing evidence, that: (1) the evidence was discovered after trial; (2) the moving party was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to evidence introduced at trial; and (5) it is reasonably probable that a different result would be reached at a new trial. ***Id.*** In addition, when the newly discovered evidence must sufficiently corroborate the recantation before the defendant is entitled to a new trial. ***Id.*** at 500, 550 N.W.2d at 447. In this case, the trial court found that the first three requirements were met. In addressing the fourth requirement, the trial court found Kellner's reasons for his [9] recantation cumulative to evidence the jury heard at trial. Regarding the fifth requirement, the trial court found that the recantation was not credible and, therefore, concluded that there was no reasonable probability of a different outcome at a new trial.

Piaskowski maintains that under McCallum, the question under the fifth prong is whether the jury could find the recantation sufficiently credible to raise a reasonable doubt, not whether the trial judge personally believed the

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that Wiener killed his brother, Tim, to prevent him from revealing Wiener's role in the murder.

In its postconviction decision and order, the trial court applied the five requirements set forth in McCallum and concluded that newly discovered evidence regarding Wiener did not warrant a new trial court found the evidence met the first four requirements, it found that the fifth requirement was not met:

> Quite frankly, the testimony and affidavits submitted both in support of an in denial of defense's present contentions might be described as imaginative, resourceful, and innovative, but *in no event could the word "credible" be attached to them*. [E]vidence presented for that impeachment would interject a sideshow atmosphere that would have a tendency to, or indeed result in the creation of a full three-ring circus. (Emphasis added.)

Following the logic of McCallum, if a trial court finds newly discovered impeachment evidence not credible, it likewise leads us to conclude that the impeachment evidence would not lead to a difference result at a new trial. At postconviction motions, the trial court heard inmates Marcum, Wnek, and Grunkowski and had the opportunity to observe their demeanors and hear them [12] explain the context and circumstances in which these statements were made. In the trial court's opinion, these witnesses' testimony not only contained "gratuitous information" having little probative value, but the witnesses perhaps harbored "suspect agendas." The trial court's findings regarding the credibility of Wnek, Marcum, and Grunkowski were not clearly erroneous.

Based on our review of the voluminous record, it does not appear that Gawryleski gave live testimony at the

postconviction hearings. Nonetheless, the trial court did pass on the credibility of her affidavit. We will affirm the trial court's findings regarding Gawryleski's incredibility if the inference of incredibility may reasonably be drawn from her affidavit. *See* ***Eau Claire Press Co. v. Gordon***, 176 Wis.2d 154, 160-62, 499 N.W.2d 918, 920-21 (Ct. App. 1993).[8]

Gawryleski was living with Tim Wiener at the time David Wiener killed Tim. In her affidavit, she states that she overheard a telephone conversation during which Tim told David that "he was going to narc on him." She further states that she has always believed Tim was referring to David's involvement in the Monfils case and that in her opinion, "that is the reason or part of the reason that David shot him." Significantly, however, Gawryleski never heard Tim tell David [13] that he would "narc" on him specifically for David's alleged role in the Monfils' murder, yet she offers the opinion that this furnished part of the motive for Tim's murder. In contrast, she offers pure speculation that the potential "narc" dealt with Monfils' murder. For these reasons, the trial court could reasonably find her proposed testimony not only incredible, but also irrelevant. Thus, there is no reasonable probability that the introduction of such information at a new trial could lead a jury to have a

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[8] Although there is some dispute whether we should defer to the trial court's findings relative to the affidavits, it is our opinion that the better rule is to defer to the reasonable inferences the trial court drew from these two affidavits. *See* Honorable Thomas Cane & Kevin M. Long, *Shifting the Main Event: The Documentary Evidence Exception Improperly Converts the Appellate Courts Into Fact-Finding Tribunals*, 77 MARQ. L. REV. 475, 488 (Spring 1994). This court is in no better position than the trial court to pass on the credibility of this documentary evidence. *See generally* ***id***. The trial court heard all the testimony in this 28-day trial and was in a superior position to draw reasonable inferences from these affidavits than this court. In our opinion, the documentary evidence exception to the clearly erroneous rule "turns appellate courts into fact-finding tribunals, wastes judicial resources, and lengthens the already arduous road to judicial finality." *See* ***id***. at 475-76.

reasonable doubt as to Piaskowski's guilt. Accordingly, we affirm the trial court's denial of a new trial based upon newly discovered evidence about Wiener.

3. Admission of Codefendant's Hearsay Statement

Piaskowski claims Kellner's trial testimony regarding his conversation with Kutska at the Fox Den Bar was inadmissible hearsay. Kellner testified that sometime between 8 and 10 p.m., Kutska began discussing the events of November 21, 1992, the day of Monfils' murder. Kellner further testified that Kutska described the playing of the tape in No. 9 coop, including the names of the people present at the time. The jury heard the following testimony:

> Q. Can you tell the jury who Mr. Kutska told you were present in the No. 9 coop after the tape had initially been played to Mr. Monfils?
>
> A. Yes, sir. There was Rey Moore, he was the last man in. There was Mike Johnson, Dale Basten, Keith, Jon Mineau, Mike Hirn.
>
> Q. Did he indicate anyone else?
>
> A. Yes, sir. He said there was two others, but I don't remember who they are.
>
> Q. What did he say occurred?
>
> A. He said that they played the tape. I don't know if the guys in the coop were getting would up about it and that they wanted to go confront Tom [Monfils] about it.
>
> . . .
>
> [14] Q. Do you recall Mr. Kutska telling you that Mike Piaskowski was in the coop at that time?

A. Yes, sir.

. . .

Q. So the people in the coop just after the playing of the tape or prior to their leaving the coop, the No. 9 coop, who were they?

A. Dale Basten, Mike Hirn, Rey Moore, Keith, John Mineau and Mike Piaskowski.

Q. And that's what Mr. Kutska told you on that occasion?

A. Yes, sir.

Kellner also testified that Kutska directed himself, Kellner's wife, and Kutska's wife in a role-play of the confrontation and explained events in the contest of "what if" situations. Kellner testified as follows:

Q. What did [Kutska] say happened?

A. He said that during this confrontation that somebody had come up and given Tom [Monfils] a slap upside the back of his head.

. . .

Q. Did Mr. Kutska ever indicate that Tom [Monfils] had been struck in any other manner at that time?
A. He did. That what if somebody had used a wrench or board or something from that area . . .

The trial court rejected the plaintiff's motion to suppress the testimony as hearsay and found the statements admissible as statements against interest. For that reason, it included an accomplice instruction in its preliminary instructions to the jury at the start of the trial. However, no cautionary or limiting instruction regarding the jury's use of

Kellner's testimony against any or all defendants was either requested or given directly before or after Kellner testified. Counsel for all defendants cross-examined Kellner regarding his recollection of the events, his state of intoxication, and the specifics of what Kutska said. Kutska [15] testified in his own defense, and counsel likewise examined him at length regarding his statement to Kellner and the events of November 21. Kutska denied ever having a conversation with Kellner at the Fox Den describing a confrontation or being involved in any role-playing.

Under § 808.01(3), STATS., hearsay is an out of court statement offered to prove the truth of the matter asserted. To be admitted, hearsay must satisfy one of the exceptions to the hearsay rule. Section 908.02, STATS. Generally, a decision on the admission of hearsay evidence is a matter within the trial court's sound discretion. ***State v. Stevens***, 171 Wis.2d 106, 111, 490 N.W.2d 753, 756 (Ct. App. 1992). We will not reverse unless there has been a misuse of discretion or the trial court based its decision on an erroneous view of the law. ***Id.*** Whether a statement is admissible under a hearsay exception, however, is a question of law we review de novo. ***Id.*** at 112, 490 N.W.2d at 756.

We now turn to whether Kutska's statement was admissible under § 908.045(4), STATS., as an exception t §908.02, STATS., the hearsay rule. Under this section, an out-of-court statement is admissible if the declarant is unavailable and the statement is against the declarant's penal, societal, or pecuniary interest. ***State v. Buelow***, 122 Wis.2d 465, 474-76, 363 N.W.2d 255, 260-62 (Ct. App. 1984). The rationale for admission of statements against interest is that they possess circumstantial guarantees of trustworthiness based on the assumption that people do not falsely make damaging statements about themselves unless true. *See* ***Id.*** at 477, 363 N.W.2d at 262 (citing Advisory Committee Notes

on Proposed [16] Rules, 28 U.S.C. Rule 804(b)(3) (1982)), *rev'd on other grounds*, ***Buelow v. Dickey***, 847 F.2d 420 (8th Cir. 1988).[9]

The trial court found Kutska unavailable because he was named defendant in a criminal trial, and the State could not compel him to testify. Relying on ***State v. McConnohie***, 121 Wis.2d 57, 75-76, 358 N.W.2d 256, 265-66 (1984), Piaskowski argues that the declarant is not deemed unavailable unless he is called to the stand and actually invokes his Fifth Amendment privilege.[10] We disagree.

McConnohoie was charged, along with codefendant LaFrance, with party to the crime of armed robbery. LaFrance pled no contest tot he charge one day before McConnohie's trial. McConnohoie testified in his own defense and sought to introduce evidence that he heard LaFrance say that LaFrance and an individual named Serio committed the armed robbery. ***Id.*** at 61, 358 N.W.2d at 258. The court explained that at the time McConnohie attempted to testify to LaFrance's statement, § 908.045(4), STATS., was not applicable because there had been "no showing by the defendant of LaFrance's unavailability at the time the defendant testified. Although LaFrance possessed a fifth amendment privilege, it was not known that he would invoke that privilege until he as actually called." ***McConnohie***, 121 Wis.2d at 75-76, 358 N.W.2d at 265-66.

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[9] Wisconsin's statement against interest exception is essentially the same as FED. R. EVID. 804(b)(3).

[10] The Fifth Amendment to the United States Constitution provides that "No person ... shall be compelled in any criminal case to be a witness against himself ..." The same protection is provided under the Wisconsin Constitution by art. I, § 8, which provides, "No person ... may be compelled in any criminal case to be a witness against himself ..."

[17] The declarant, LaFrance, was in a substantially different situation from Kutska. LaFrance, no longer a defendant, had entered a no contest plea and was awaiting sentencing at the time of McConnohie's trial. *See* ***id.*** at 61-62, 358 N.W.2d at 259. Importantly, because LaFrance no longer remained a codefendant, he could be called as a witness to determine whether he would claim the Fifth Amendment privilege and therefore be unavailable. In sharp contrast to McConnohie, Kutska had entered a not guilty plea and was in the midst of a jury trial on the charge at the time the statement was offered. It is elementary that under no circumstances could be State call Kutska as a witness to determine whether he would assert the Fifth Amendment privilege without incurring a mistrial. *See* U.S. CONST., AMEND. V. Therefore, he was unavailable.

Given that Kutska was unavailable, we next address whether Kutska's statement meets the criteria for a statement against interest under § 908.045(4), STATS. The statute provides in part:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . .
>
> **(4)** STATEMENT AGAINST INTEREST. A statement which ... at the time of its making ... so far tended to subject the declarant to civil or criminal liability ... or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true.

A statement against interest need not amount to a confession, but it must tend to subject the declarant to criminal liability. ***Ryan v. State***, 95 Wis.2d 83, 97, 289 N.W.2d 349, 355 (Ct. App. 1980), overruled on other grounds by ***State v.***

Anderson, 141 Wis.2d 653, 416 N.W.2d 276 (1987). Piaskowski contends that Kutska's July 4, 1994, conversation with Kellner can be distilled to an exculpatory [18] statement, stating that "he merely watched what other people did during the confrontation." We disagree and conclude that because the statement was against Kutska's penal and societal interests, it was admissible.[11]

Whether a statement is against penal interest is determined under the circumstances existing at the time the statement was made. ***United States v. Hamilton***, 19 F.3d 350, 357 (7th Cir. 1994) (citing Advisory Committee Note to Rule 804(b)(3)). The record reveals that approximately two years had passed from the date of Monfils' murder to the time Kutska made the statements to Kellner. Although police had questioned Kutska on numerous occasions, they had made no arrests in the case and the investigation was still pending. Additionally, James River had discharged Kutska from his job, an Monfils' widow and children had named Kutska as a party in a civil wrongful death actions. Under the circumstances existing at the time Kutska made his statement to Kellner, the content and nature of the conversation were of the kind that would tend to subject Kutska to criminal charges, at least for party tot he crime of battery, if not homicide. Although Kutska may have subjectively believed he was exculpating himself by stating he was not actively involved in the confrontation, a reasonable person would not untruthfully assert his involvement in a verbal and physical confrontation with a man who was murdered minutes later.

We alternatively address whether the statements were against Kutska's societal interests. Two requirements must

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[11] Because we conclude that the statements are admissible under § 908.045(4), we need not address the State's argument that the statements are admissible as prior inconsistent statements. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

be satisfied to admit a statement against societal interests: (1) the declarant must objectively face the [19] risk of hatred, ridicule, or disgrace; and (2) the declarant must subjectively appreciate the statement's propensity to subject him to such disgrace. ***Stevens***, 171 Wis.2d at 113-14, 490 N.W.2d at 757. We evaluate the statement from the standpoint of whether Kutska actually faced a risk of hatred, ridicule, or disgrace. "[T]he real issue is the extent of the declarant's personal connection to the activity reported in his or her declaration," as the declarant must have a personal interest in keeping the statement secret. ***Id.*** at 118, 490 N.W.2d at 759.

We have no difficulty concluding that Kutska's statement, in which he admitted his role in inciting a confrontation with Monfils and his presence at the confrontation, establishes a close personal connection to the events immediately before Monfils' murder. This is the type of statement that would objectively inspire hatred, ridicule, or disgrace if it became known in the larger community. Kutska couched his comments in terms of "what if" certain things had occurred, and this demonstrates that he appreciated the risk of social disapproval. Accordingly, we conclude that Kutska's statement was admissible under § 908.045(4), STATS., as a statement against both his penal and societal interests.

4. Severance

Piaskowski claims the trial court erred when it refused to sever his trial from Kutska's. He contends that because the State introduced an entire line of evidence against Kutska that did not apply to him, the plain language of § 971.12(3), STATS., mandates severance. Additionally, Piaskowski argues that Kutska's hearsay statements were inadmissible against Piaskowski, and that to the extend that Kutska's statements exculpated him by pointing the finger at

others, they were inadmissible because they were not statements against Kutska's penal or [20] societal interests. Finally, he argues that the trial court compounded its error by failing to give a limiting instruction. We affirm the court's denial of severance.

A trial court may try defendants together when they are charged with the same offense arising out of the same transaction and provable by the same evidence. ***State v. Brown***, 114 Wis.2d 554, 559, 338 N.W.2d 857, 860 (Ct. App. 1983). The decision whether to grant or deny a motion for severance is within the trial court's discretion, and we will not disturb its decision unless there has been a misuse of discretion. ***Id.*** Whether there has been a misuse of discretion is determined based on the facts of each case. ***Jung v. State***, 32 Wis.2d 541, 545-46, 145 N.W.2d 684, 686 (1966). We will affirm the trial court if there is a reasonable basis for its decision. ***State v. Nelson***, 146 Wis.2d 442, 456, 432 N.W.2d 115, 121 (Ct. App. 1988).

If it appears that a defendant is prejudiced by the joinder of his trial with other defendants, the court may grant a severance of defendants or provide whatever other relief justice requires. Section 971.12(3), STATS. If it appears during the course of trial that "an entire line of evidence" is produced that is only admissible as to one defendant and is unduly prejudicial to other defendants, then the trial court may order a severance at that time, or the court may elect to give the jury a cautionary instruction to the effect that "evidence against one may not be treated as evidence against all, simply because they are being tried together." ***State v. Jennaro***, 76 Wis.2d 499, 505, 251 N.W.2d 800, 803 (1977) (quoting ***State v. DiMaggio***, 49 Wis.2d 565, 577, 182 N.W.2d 466, 473 (1971). Further, when evidence is admissible against all defendants, there is no prejudice

because the evidenee could be introduced at separate trials. ***Id.***

[21] Here, the trial court determined that because all defendants were charged with the same offense, as party to a crime, involving the same victim, the elements of the offense were provable by the same evidence, and it further concluded that the bulk of the evidence would have been presented against each defendant if tried separately. It recognized that some evidence would not apply to certain defendants and cautioned the jury as follows:

> Some evidence has been received in this trial which relates to one or more of the defendants, without having any reference to the remaining defendants. In considering and evaluating such evidence, you should exercise the utmost care and discretion. *Such evidence may be used only in considering whether the individual or individuals with whom it is concerned are guilty or not guilty. Such evidence must not be used or considered in any way against any of the other defendants who are not implicated by such evidence, either directly or by inference, except insofar as you may consider that evidence in connection with the instructions which have been given you regarding a conspiracy.* (Emphasis added.)

This instruction guarded against the risk that jurors would apply all evidence in a blanket fashion against all defendants. ***State v. Lukensmeyer***, 140 Wis.2d 92, 110, 409 N.W.2d 395, 403 (Ct. App. 1987) (we presume jurors follow such admonitory instructions).

We next address whether Kutska's hearsay statement mandates severance because it was admissible at trial only against Kutska. Under § 971.12(3), STATS., if the State intends to use the statement of a codefendant that implicates

another defendant in the crime charged, the judge shall grant a severance as to any such defendant. ***Id.*** The purpose of § 971.12(3) is to provide a mechanism to ensuring compliance with ***Bruton v. United States***, 391 U.S. 123 (1968), which prevents the use of a codefendant's statement inculpating another [22] defendant at a joint trial based on the codefendant's Sixth Amendment right to confront witnesses. ***Pohl v. State***, 96 Wis.2d 290, 301, 291 N.W.2d 554, 559 (1980). We conclude that the trial court did not misuse its discretion.

Kutska's statement was self-inculpatory and directly admissible against all of his codefendants under a firmly-rooted hearsay exception. *See* ***Williamson v. United States***, 512 U.S. 594, 601 (1994). The statement was made by a declarant-defendant in a social setting to a friend. In Kutska's conversation with Kellner, he did not engage in "finger-pointing" or specifically blame another person. He described the events of the confrontation in "what if" terms, saying "what if somebody had used a wrench or board or something from that area" to strike Monfils. Rather than making specific incriminating and inculpatory statement about his codefendants, he emphasized to Kellner that he knew who had hit Monfils but would not say who had done it.

The ***Williamson*** Court's comments are instructive:

> For instance, a declarant's squarely self-inculpatory confession . . . will likely be admissible under Rule 804(b)(3) against accomplices of his who are being tried under a co-conspirator liability theory. Likewise, by showing that the declarant knew something, a self-inculpatory statement can in some situations help the jury infer that his confederates knew it as well. And when seen with other evidence, an

> accomplice's self-inculpatory statement can inculpate the defendant directly: "I was robbing the bank on Friday morning," coupled with someone's testimony that the declarant and the defendant drove off together Friday morning, is evidence that the defendant also participated in the robbery.
>
> Moreover, whether a statement is self-inculpatory or not can only be determined by viewing it in context. ... The question under Rule 804(b)(3) is always whether the statement was sufficiently against the declarant's penal interest "that a reasonable person in the declarant's position would not have made the statement unless believing it to be [23] true," and this question can only be answered in light of all the surrounding circumstances.

Id. at 603-04 (citation omitted).

Kutska's description of the events establishes his involvement in a confrontation with Monfils close to the time of Monfils' murder. Each part of Kutska's statement to Kellner was self-inculpatory in nature and not an attempt to deflect Kutska's blameworthiness to others. Any of his statements tending to establish the presence or actions of any other persons are sufficiently closely connected to the inculpatory statements and satisfy the requirement of trustworthiness. Because Kutska's statement consisted of self-inculpatory statements, it was properly admissible as evidence, not only against Kutska, but also against Piaskowski. The trial court had a proper basis for denying severance and gave an appropriate cautionary instruction;

consequently, there was no misuse of discretion and we therefore affirm.[12]

[24] 5. Confrontation Clause Violation

Piaskowski next claims that the trial court improperly denied his request to cross-examine David Wiener regarding his alleged "deal" with the State and Wiener's resulting bias. At the time of trial, Wiener was serving a sentence for an unrelated homicide conviction. After hearing arguments outside the jury's presence, the court set parameters regarding cross-examination of the alleged deal. First, counsel could ask whether Wiener had a "deal" with the State, and, if so, counsel could "inquire into it." If there was no deal, then counsel could ask if Wiener expected to receive a deal. Second, the trial court concluded that the length of his

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[12] In support of his argument, Piaskowski cites ***Cranmore v. State***, 85 Wis.2d 722, 739-40, 744, 271 N.W.2d 402 (Ct. App. 1978) for the proposition that defendant's out-of-court statement is inadmissible against a codefendant. We reject this argument. In ***Cranmore***, the court recognized that ***Bruton v. United States***, 391 U.S. 123 (1968), stands for the proposition that "the admission into evidence of a statement by one defendant, implicating a codefendant in that trial, where the declarant exercised his fifth amendment privilege not to testify was constitutionally impermissible." ***Id.*** at 744-45, 271 N.W.2d at 414. In other words, the court concluded that the confrontation clause was violated because the codefendant exercised his Fifth Amendment right; moreover, it noted that a cautionary instruction could not cure the violation. ***Id.*** Unlike in Bruton, here Kutska did not exercise his Fifth Amendment privilege; rather, he took the stand and was cross-examined.

In addition, even if the trial court committed error by denying the motion to sever, any error under § 971.12(3), STATS., and ***Bruton*** was consequently rendered harmless by Kutska's eventually testifying in his own defense and his codefendants' opportunity to cross-examine him concerning his alleged statements to Kellner naming them as participants in the confrontation with Monfils. *See* ***State v. King***, 205 Wis.2d 81, 94-95, 555 N.W.2d 189, 194-95 (Ct. App. 1996).

sentence and nature of his crime were irrelevant and collateral. Significantly, in response to the State's questions, Wiener testified on both direct and cross-examination that the State made him no promises in exchange for his testimony. When Basten's counsel asked if Wiener had directed his attorney to continue negotiations on his behalf, the trial court sustained the State's relevancy objection.

The scope of cross-examination for impeachment purposes is within the trial court's sound discretion, ***Rogers v. State***, 93 Wis.2d 682, 689, 287 N.W.2d 774, 777 (1980), and we will affirm if there is a reasonable basis for the trial court's determination. ***State v. McCall***, 202 Wis.2d 29, 35, 549 N.W.2d 418, 421 (1996). When a witness believes that the State may benefit him if he shades his testimony, the defendant has a constitutional right to explore potential bias. ***Lindh v. Murphy***, 124 F.3d 899, 901 (7th Cir. 1997). However, a defendant's constitutional right to confrontation does not include the right to present irrelevant, immaterial, or prejudicial evidence. *See* ***McCall***, 202 Wis.2d at 44, 549 N.W.2d at 424. Courts should permit inquiry into crimes unrelated to its case when the State and the witness made a deal in exchange for the witness's testimony in the case [25] then before the court. *See* ***id.*** at 42, 549 N.W.2d at 423 (no misuse of discretion when the trial court concluded that "further inquiry into the existence of an alleged, though unproven agreement, would be wholly distracting and speculative"). In this case, Wiener's testimony that he had made no deal with the State provides a reasonable basis for the trial court's decision. The trial court properly prohibited further inquiry into this alleged, but unproven agreement. *See* ***id.*** There was no violation of Piaskowski's right to confrontation.

6. Exculpatory Evidence

Piaskowski argues the State failed to disclose it had information that a previous statement of Kellner's contained inaccuracies. About six weeks before trial, Kellner spoke to Piaskowski's investigator and told him that he had misgivings about the statement he had previously given to police. As a result, Kellner gave a new statement in which he indicated that all of Kutska's statements began with "What if" or "this is what the police thing." The State contends that it obtained a copy of the new statement and disseminated it to all defendants. Then, about a week before trial, Kellner met with the State to discuss the differences between the two statements. The State's failure to disclose the contents of this discussion form the basis of Piaskowski's objection.

Due process requires disclosure of evidence that is both favorable to the accused and material either to guilt or punishment. ***State v. Ray***, 166 Wis.2d 855, 870, 481 N.W.2d 288, 294 (Ct. App. 1992) (citing ***State v. Garrity***, 161 Wis.2d 842, 848, 469 N.W.2d 219, 221 (Ct. App. 1991)). Evidence is material only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ***Id.*** A reasonable probability is one "sufficient to undermine confidence in the outcome." [26] ***Id.*** While we agree that the new statement is favorable to Piaskowski, we conclude that it was not material.

Under the ***Brady*** materiality test, there is no reasonable probability that had the State given the information to Piaskowski, a different result would have occurred. Kellner still would have been subject to impeachment based on his several statements and the ultimate determination of believability would still have remained in the hands of the jury, which evaluates the

versions and decides which, if either, to believe. The inconsistencies in Kellner's second statement are not sufficient to undermine our confidence that the outcome would change. We recognize that disclosure of Kellner's misgivings would have been helpful to Piaskowski; however, the State is not under a constitutional obligation to provide Piaskowski with discovery of helpful, but nonexculpatory evidence. *See* ***State v. Denny***, 120 Wis.2d 614, 628, 357 N.W.2d 12, 19 (Ct. App. 1984).

7. Randy Winkler's Personnel Records

Finally, Piaskowski asks this court to review Randy Winkler's sealed personnel records to determine whether they impeach his credibility. The trial court conducted an in-cameral review and determined that the records were irrelevant to Winkler's credibility.[13] In denying to turn the file over to the defense, the trial court noted that the file did not demonstrate any complaints or concerns about Winkler's investigation of the Monfils murder, but instead concerns [27] unrelated personnel matters. Further, the trial court found that Winkler's credibility was repeatedly attached during trial. Under ***State v. O'Brien***, 214 Wis.2d 327, 340, 572 N.W.2d 870, 876-77 (Ct. App. 1997), the party filing the postconviction request must convince the trial court, among other things, that the anticipated results of the postconviction discovery are relevant. ***Id.*** We review the trial court's relevancy finding for a misuse of discretion. ***Id.*** at 341, 572 N.W.2d at 877-78. As appellant counsel requested in his

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[13] In his reply brief, Piaskowski argues for the first time that he has constitutional right to exculpatory evidence (here the personnel records) in the State's possession, citing ***Kyles v. Whitley***, 514 U.S. 419, 433-34 (1995), and ***Giglio v. United States***, 405 U.S. 150, 154 (1972). A party cannot raise an argument for the first time in a reply brief, so we decline to consider this argument. *See* ***Hogan v. Musolf***, 157 Wis.2d 362, 381 n.16, 459 N.W.2d 865, 873 n.16 (Ct. App. 1990), rev'd on other grounds, 163 Wis.2d 1, 471 N.W.2d 216 (1991).

brief, we have reviewed Winkler's entire personnel file. After reviewing the file, we agree with the trial court's conclusion that its contents are irrelevant. Accordingly, we affirm the trial court's denial of Piaskowski's request for postconviction discovery.

By the Court. - Judgment and order affirmed.

Not recommended for publication in the official reports.